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January 26, 1998

**BY HAND DELIVERY**

Ms. Magalie Salas, Secretary  
Federal Communications Commission  
1919 M Street N.W., Room 222  
Washington, D.C. 20554

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**JAN 26 1998**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

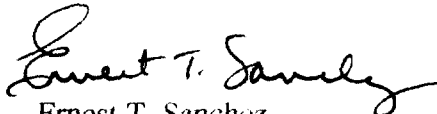
**Re:** In the Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (MM Docket 97-234, GC Docket No. 92-52, GEN Docket No. 90-264. Comments of Hispanic Information and Telecommunications Network, Inc.

Dear Ms. Salas:

Enclosed, on behalf of The Hispanic Information and Telecommunications Network (HITN), are the original and eleven (11) copies of HITN's Comments in the above referenced rulemaking.

If you have any questions about this filing, please let me know.

Sincerely,



Ernest T. Sanchez  
Counsel for  
Hispanic Information and  
Telecommunications Network

Enclosure

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**In the Matter of**

**Implementation of Section 309(j) of the  
Communications Act -- Competitive Bidding  
for Commercial Broadcast and Instructional  
Television Fixed Service Licenses;  
Reexamination of the Policy Statement on  
Comparative Broadcast Hearings; Proposals  
to Reform the Commission's Comparative  
Hearing Process to Expedite the Resolution  
of Cases**

**MM Docket No. 97-234  
GC Docket No. 92-52  
GEN Docket No. 90-264**

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**COMMENTS  
OF  
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.**

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## **SUMMARY**

The Hispanic Telecommunications and Information Network, Inc. ("HITN"), is a private not-for-profit educational programming network presently holds ITFS licenses in 43 cities, for which it provides bilingual instructional programming and learning services. HITN provides comments in response to the questions raised by the Commission in part III. D of the Notice of Proposed Rulemaking ("NPRM").

In its Comments, HITN responds to the Commission's first question, regarding whether Congress has included or excluded ITFS from its recent mandate to require competitive bidding for licenses, by agreeing (on the basis of statutory construction principles) with the Commission's tentative interpretation that the mandate does extend to ITFS. With respect to the second question -- whether, as a matter of policy, competitive bidding should extend to ITFS -- HITN also expresses agreement with the Commission's position that it would generally be appropriate to include ITFS licenses. Finally, HITN expresses its position that, for the most part, the rules and procedures should be the same as for commercial radio and TV broadcast licenses, but with certain exceptions relating to the unique nature of ITFS and of the nonprofit entities that compete for ITFS licenses.

HITN concludes its comments by proposing several policies favoring rules that would encourage settlements of pending as well as future ITFS application proceedings.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Implementation of Section 309(j) of the</b>	)	<b>MM Docket No. 97-234</b>
<b>Communications Act -- Competitive Bidding</b>	)	<b>GC Docket No. 92-52</b>
<b>for Commercial Broadcast and Instructional</b>	)	<b>GEN Docket No. 90-264</b>
<b>Television Fixed Service Licenses;</b>	)	
<b>Reexamination of the Policy Statement on</b>	)	
<b>Comparative Broadcast Hearings; Proposals</b>	)	
<b>to Reform the Commission's Comparative</b>	)	
<b>Hearing Process to Expedite the Resolution</b>	)	
<b>of Cases</b>	)	

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**COMMENTS  
OF  
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.**

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The Hispanic Information and Telecommunications Network, Inc. (hereafter, "HITN"), by and through its counsel, files these Comments in the above-captioned rulemaking proceeding of the Federal Communications Commission. HITN's Comments are addressed to the questions raised by the Commission in Section III. D of the Notice of Proposed Rulemaking ("NPRM"), entitled "Auction Authority for Instructional Television Fixed Service."

**I. INTRODUCTION AND BACKGROUND.**

**A. The Rulemaking Issues.** The NPRM in the above-captioned proceeding, FCC 97-397, as released on November 26, 1997 (and corrected by an Erratum issued on

December 11, 1997), proposed that general competitive bidding procedures should be utilized for all broadcast services that would be considered auctionable within the scope of amended section 309(j) of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). This statute expanded the Federal Communications Commission's competitive bidding authority, under section 309(j), to include mutually exclusive initial license applications for certain types of broadcast stations. The NPRM seeks comment on the Commission's proposed rules regarding competitive bidding for prospective mutually exclusive applications for new commercial radio and television broadcast stations. The NPRM also seeks comment on the Commission's proposal to also use auctions, rather than comparative hearings, for resolution of pending competing applications for commercial radio and television broadcast stations filed before July 1, 1997.

The NPRM also seeks comments on whether the Commission is "required to use auctions to resolve mutually exclusive applications for Instructional Television Fixed Service (ITFS)." HITN addresses these latter issues, raised in Section III. D of the NPRM, which concern issues of both statutory construction and telecommunications policy.

**B. HITN and ITFS.** HITN is a private not-for-profit organization which was established in 1983 in order to create a network of noncommercial television facilities which would advance the educational, social, cultural, and economic aspirations of American Hispanics. HITN is an educational and cultural programming network which presently holds ITFS licenses in 43 cities, 28 of which have already been constructed and are operational, and offers 24-hour programming in both the Albany and New York City areas.

HITN currently provides bilingual English and Spanish instructional programming to schools, including interactive distance learning services, and has sophisticated program production and transmission capabilities and facilities, including satellite.

The NPRM seeks comment on three issues with respect to ITFS applications. The Commission asks "whether we must, and if not, whether we should, apply competitive bidding to mutually exclusive ITFS applications." Comment is also sought "on all issues relating to our statutory authority to auction mutually exclusive ITFS applications and on the appropriateness of so doing, if the Commission has any discretion in the matter." Finally, the NPRM seeks comment on its tentative proposal to apply to ITFS applications the same "general auction rules adopted in this proceeding for broadcast applications."

In these Comments, HITN responds to the Commission's request for comment on these three areas.<sup>1</sup> HITN believes that the current comparative standards for resolving mutually exclusive ITFS applications are unfair, outdated, and cumbersome, and should be replaced with competitive bidding procedures similar to those to be developed for commercial radio and TV broadcast stations. HITN also believes that this is the result intended by Congress in enacting § 309 (j) and that, as with commercial radio and TV proceedings, a competitive bidding procedure will greatly improve and expedite the ITFS application process. HITN's experience as an HITN licensee and applicant leads it to voice some concern, however, regarding the overall long-term effects of a market-based system

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<sup>1</sup> HITN specifically notes that the NPRM is silent with respect to any potential re-allocation of ITFS spectrum. It has not, therefore, commented on this issue although rumors are circulating in the ITFS community that such a policy may be under consideration. HITN requests that the Commission use this rulemaking as an opportunity to re-affirm its commitment to ITFS and the existing ITFS frequency allocations and, thereby, quell such rumors.

on the type of local and national nonprofit entities that make up the ITFS educational sector. HITN offers some specific suggestions for rulemaking that may help the Commission exercise those discretionary aspects of its Congressional authority which permit it to tailor its auction rules to fit unique ITFS circumstances.

## **II. HITN'S COMMENTS IN RESPONSE TO THE ISSUES IDENTIFIED IN SECTION III. D OF THE NPRM.**

### **A. Does the Congressional Directive for Competitive Bidding Include ITFS Applications?**

Section 309(j)(1) of the amended Act, under the heading "General Authority", provides that, with respect to

mutually exclusive applications for any initial license or construction permit, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection (emphasis added).

The clear language of the statute is both mandatory ("shall") and comprehensive ("any") and strongly indicates that Congress intended to require the Commission to utilize a competitive bidding (auction) process for all mutually exclusive applications except for those expressly excluded by section (j)(2). Legislative intent can usually be determined simply by considering the statute's plain language. As the Supreme Court has stated that "[t]he one cardinal canon [of statutory interpretation] before all others" is that one must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). The Court concluded: "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* It is only when a statute is ambiguous or unclear



that recourse to legislative history is needed to ascertain legislative intent. As the Commission pointed out (§ 99), the legislative history of the statute is silent on ITFS.

The term "any", however, is clear and unambiguous: Congress wants the Commission to use competitive bidding to resolve mutually exclusive applications in all proceedings subject to section 309, broadcast and non-broadcast, except for applications for those three types of licenses that are specifically exempted in the next paragraph of this subsection. Also, the statute's use of "shall" indicates that the Commission lacks any discretion regarding whether it must use competitive bidding regarding non-exempt applications. When a statute grants permissive authority, that grant is phrased as "may" not "shall." Here, the term used is "shall." Thus, unless a particular type of license is exempted, the Commission has no discretion regarding whether it must utilize a system of competitive bidding to resolve mutually exclusive applications for that category of license.

With respect to interpreting statutory exceptions, the primary rule of construction has been stated as follows: "When Congress enumerates an exception or exceptions to a rule, we can infer that no other exceptions apply." *Koniag v. Koncor Forest Resource*, 39 F. 3d 991, 998 (9th Cir. 1994); *Horner v. Adnrzjewski*, 811 F.2d 571, 574-75 (Fed. Cir.), cert. denied, 484 U.S. 912 (1987); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47.23 (5th Ed. 1992).

Three exemptions are set forth in paragraph (2), which states that the Commission's competitive bidding authority does not apply to licenses or construction permits for public safety radio services; initial licenses or construction permits for digital television services given to existing licensees to replace analog service licenses; and noncommercial educational

broadcast station licensees, as defined in section 397 (6) of the Act. ITFS stations are not among the specified exemptions. As explained above, we must presume that, if Congress had wished to exempt ITFS from the mandatory auction requirement, it would have said so. Furthermore, even though ITFS licensees are typically nonprofit organizations with an educational purpose and educational programming, they are not exempted along with public TV or radio broadcast stations because they are not included within the referenced definition set forth in § 397 (6). Unquestionably, as the Commission indicated in its NPRM (¶¶ 98, 99, 100), Congress intended to include the auctioning of ITFS stations within its mandatory directive to the Commission.

**B. Should the Commission Apply Competitive Bidding to Mutually Exclusive ITFS Applications?**

Inasmuch as Congress has made its intent clear, the question of whether the Commission should exercise discretion to require auctions for mutually exclusive ITFS applications is answered. As a matter of policy, however, HITN submits that, even if Congress had not required auctions for ITFS, the same policy considerations recognized by the Commission as favoring competitive bidding for commercial radio and television stations applicants would also apply to ITFS proceedings.

HITN notes initially that the Commission clearly proposes to use competitive bidding procedures whenever possible -- in the mandatory area of future mutually exclusive applications for commercial radio and TV, as well as the permissive area of pending applications for such licenses. The NPRM specifically justifies this latter decision on the stated basis that "using auctions to resolve pending comparative licensing cases better serves the public interest than deciding them by comparative hearing" (¶14, p. 17). The NPRM also

notes favorably that "in reviewing the relative merits of comparative hearings and auctions with respect to other services, we note that in other contexts we have found that auctions are preferable to comparative hearings." The NPRM proposes that competitive bidding should be recognized as the "Congressionally preferred method of awarding spectrum licenses" (§ 18, p. 19), and indicates that such a system will be proposed for use regarding low power television stations, television translator service, FM translator service, mutually exclusive applications to modify existing facilities, and assignment of DARE licenses.

The advantages of auctions cited variously throughout the Discussion Section of the NPRM include the following: it provides for a more speedy resolution of cases (§17, p. 20); it encourages the efficient use of the spectrum by awarding it to the applicant who values it the most, thus expediting quality service to the public (§ 18, n. 13, pp. 20 -21); it minimizes judicial and administrative delays associated with other licensing alternatives (§ 18, n. 13, pp. 20 - 21). The NPRM cites The FCC Report to Congress on Spectrum Auctions, FCC 97-353, at 10 (adopted September 30, 1997) for the conclusion that

competitive bidding is a more efficient method of assigning spectrum licenses in cases of mutual exclusivity than any previously employed method and that, in contrast to lotteries and comparative hearings, the auction process rapidly awards licenses to productive users, encourages the emergence of innovative firms and technologies, generates valuable market information, and compensates the public for the use of the airwaves (§ 18, n. 13, pp. 20 - 21).

Nothing in the Commission's Report to Congress or in the NPRM indicates that these advantages do not apply equally to ITFS licenses and proceedings. In fact, they do so apply for the same problems with delay, inefficiency, judicial appeals, and concerns about selection criteria exist with respect to the ITFS licensing process. The positive policy reasons that support the utilization of auctions for licensing applicants for other parts of the

spectrum must also be recognized with respect to ITFS stations. Thus, even without the express Congressional mandate, the use of competitive bidding for mutually exclusive ITFS applications must be considered completely appropriate.

**C. Should the Same General Auction Rules as for Commercial Radio and TV Broadcast License Applications Be Applied to ITFS Applications?**

HITN generally agrees that the Commission's tentative proposal that the same general auction rules that are to be adopted in this proceeding for commercial radio and TV should also be applied to mutually exclusive ITFS applications. HITN's sole exception is with respect to how determinations may be made regarding mutual exclusivity (see part D below for HITN's suggested rules, as well as discussion of the policy underpinnings regarding the issue of local versus national applicants for the same license)<sup>2</sup>. With respect to general applicability of the proposed rules, however, HITN believes that it is appropriate to apply the same rules to ITFS as to other types of applicants. HITN singles out the following areas as those for which it is most significant that there be no deviation between rules for commercial broadcast and other applicants and those for ITFS applicants.

**1. Minorities.** The Commission's "longstanding commitment to encouraging minority participation in the broadcast industry" has, unfortunately, been less evident in the past with respect to HITN. Yet, the policies that underlie the Commission's positive record

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<sup>2</sup> ITFS applicants, unlike most other future spectrum auction participants, are non-profit educational organizations and government entities. It is appropriate, therefore, for the Commission to exercise the discretion it does have with respect to developing "systems" of competitive bidding in a manner that permits resolution of bids for licenses in the same locality without pitting noncommercial entities against each other in an unaffordable (and, ultimately, taxpayer-subsidized) financial escalation. HITN's suggested rule recognizes that, in many cases, the apparently-competing interests of two or more ITFS applicants can be satisfied by encouraging settlements which will apportion available spectrum among both or all applicants in a manner that reflects both fairness and market realities. In part II. C. 3 of these Comments, HITN explores some suggested areas for rulemaking that would reconcile these competing policies.

in this regard with respect to other areas is equally applicable to ITFS where, as in other media, the "views of racial minorities continue to be inadequately represented" (¶ 86, p. 96). Yet, the current selection procedure for mutually exclusive ITFS applications [47 C.F.R. §74.913(1986)] does not take minority participation or the representation of minority views into consideration, despite the clear disapproval expressed by the U.S. Court of Appeals for a specific instance of this policy failure in *Telecommunications Research and Action Center v. F.C.C.*, 836 F.2d 1349, 1357-1361 (D.C. Cir. 1988) (hereafter, "*TRAC*"). The Congressional mandate with respect to minorities under competitive bidding procedures is clear. Unlike the statute and rules at issue in the *TRAC* case with respect to the use of lotteries, the Commission has no discretion. With respect to designing a system of competitive bidding, it must for each class of licenses or permits, apply the Congressional directive to promote "equal opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B) and (4)(C). Thus, if the Commission were to "develop bidding credits or other special tools designed to further minority participation," such credits or tools should be equally available to bidders for ITFS licenses as for commercial broadcast or other licenses covered by the statute and rules.

**2. Pending ITFS Applications.** The Commission has indicated in this NPRM (at Section III. B) its intention, with respect to pending commercial radio and TV broadcast applications, to apply the same competitive bidding system and rules to these pending applications as to future such applications, based upon its tentative conclusion that to do

so would better serve the public interest. HITN agrees that it is both fair and efficient to apply the new competitive bidding rules to existing commercial broadcast applications, particularly since these entities have been able to take advantage, pursuant to 47 U.S.C. § 309(l)(3) of the Congressionally-mandated and Commission-implemented six-month settlement window which expires in February 1998.

Numerous mutually-exclusive ITFS applications are also currently pending.<sup>3</sup> Applicability of the new rules to these pending applications would perhaps be appropriate also, except for the fact that Congress only opened the settlement "window" for pending applications for commercial radio and TV broadcast stations. Considerations of fairness require that mutually-exclusive ITFS applicants be given a similar window to effectuate settlements without running afoul of any Commission rules governing such settlements. HITN proposes, therefore, that the Commission promulgate a rule which would delay the effective date of the new competitive bidding rules with respect to ITFS stations for a six-month period during which applicants would be permitted and encouraged to settle the proceedings and buy outs would be permitted, as was the case for pending commercial broadcast applications.

**D. The Commission Has Discretion to Tailor Auction Rules to Fit Specific Circumstances of Each Category of License.**

Although the Commission has no discretion as to whether or not it must develop and apply rules to set up a system for competitive bidding for mutually exclusive ITFS applications, it does have some discretion regarding the specific ways in which it tailors that

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<sup>3</sup> HITN estimates there are approximately 1,000 ITFS applications pending, most of which are mutually exclusive with at least one other pending application. The most recent ITFS filing window occurred in October 1995.

system for each category of license. 47 U.S.C. § 309(j)(3)(4). HITN suggests that specific rules be developed that will tend to help effectuate settlements, joint ventures, and other means of resolution within the non-profit ITFS sector.

Under the Commission's present rules utilizing the point system (47 C.F.R. § 74.319), local and national<sup>4</sup> educational institutions have been pitted against each other in a mutually self-defeating competition for the same or adjacent channels in the same geographic area. HITN believes that an auction-based system should not continue in any manner to utilize points or credits that might favor one type of ITFS applicant over another but, as with other types of station licenses subject to the new amendments to the Act, should help restore an equitable balance in the licensing procedures. The current procedures not only take too long, thereby delaying service, but they require the applicants and the Commission to devote valuable resources that could be better utilized elsewhere. Most importantly, the public is not being served by the current ITFS system that creates winners and losers when it is possible to have a process in which everyone can be a winner.

HITN does not maintain that it or other national entities are inherently better qualified than local accredited applicants (who are heavily favored by the current point system). Rather, it believes that local entities and accredited institutions should continue to have ready access to ITFS channels. Once the level playing field of competitive bidding is instituted, local and national ITFS will have equal opportunities and access to the ITFS spectrum. However, as a matter of both telecommunications policy and educational policy,

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<sup>4</sup> A so-called "national" ITFS applicant or licensee is a non-local educational entity which submits applications for ITFS licenses beyond their local jurisdictions in order to establish a national programming network. 58 RR 2d at 562.

national ITFS operators provide service that complements rather than duplicates the service provided by local entities. Those local entities are often not capable of producing or obtaining the program material provided by national ITFS operators, while the national ITFS entities need local customers in a substantial number of markets in order to obtain the financial resources to produce quality educational programming. Thus, in the best of all worlds, national and local entities could jointly provide a diverse menu of educational programs that will meet the needs of local communities and the diverse groups within those communities.

HITN proposes, therefore, in recognition of the unique features of ITFS stations and operators as nonprofit educational institutions who will be operating in a free market auction system, that rules be adopted in connection with competitive bidding for ITFS licenses that will encourage settlements and joint ventures between local and national applicants for spectrum in the same market.

The Commission has discretion under the statute as to the way in which it tailors competitive bidding rules for each of its various license areas. With respect to ITFS auction rules, HITN proposes the following:

- When ITFS applicants have specified the same channels in the same area of operation, thus being deemed mutually exclusive under current definitions, the later-filed application or applications will automatically be deemed to have specified vacant channels in the same market if such channels exist.
- When mutual exclusivity cannot be eliminated by changing the channel designation, the applicants will be given ninety (90) days to reach a settlement.
- Mutually exclusive ITFS applicants who do not wish to enter into a settlement resolving their conflict, will divide the channels equally.



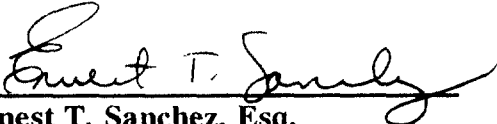
**III. CONCLUSION.** HITN submits that the rules it proposes -- which would not only encourage settlements generally but would also permit pending ITFS applicants to settle on the basis of a buy-out option similar to that granted to pending commercial applicants -- will greatly help to reduce the backlog of ITFS cases. It will also permit the nonprofit ITFS market to work within a market-oriented auction process without undue risk of overextending themselves financially in ways not always feasible or permitted for such nonprofit (or governmental or publicly-supported) entities. With these relatively-slight differences, all well with the discretionary aspects of Congress' grant of authority to the Commission, a competitive bidding system can be utilized in the nonprofit ITFS sector without the need or specter of inviting in well-heeled for-profit "silent partners", who might eventually undermine the educational purpose and nature of this portion of the spectrum.

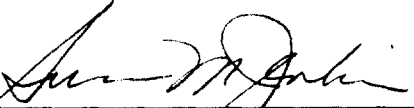
**Dated: January 26, 1998**

Respectfully submitted,

**Hispanic Information and Telecommunications  
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**By Its Attorneys:**

  
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